No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR *AMICI CURIAE* FORMER JUDGES WITH PROSECUTORIAL EXPERIENCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Pursuant to Supreme Court Rule 37, *amici curiae* respectfully submit this brief in support of Petitioner Terrance Williams. As former prosecutors who later became judges, the undersigned have a special interest in preserving the legitimacy and integrity of both prosecutors' offices and the judiciary. The perceived impartiality of the judiciary is central to this concern. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 817-18 (2002) (Ginsburg, J., dissenting) ("Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe."). *Amici* recognize the complexity of the decisions that jurists are required to make in determining whether to participate in a case, and the difficulties in assessing personal motives and biases that often accompany those decisions. *Amici* are especially cognizant of the risks of an overreaching recusal rule, and do not favor a broad expansion of this Court's due process recusal jurisprudence. Nevertheless, Chief Justice Ronald Castille's failure to recuse himself in Petitioner's case before the Pennsylvania Supreme Court is one of those egregious cases where a narrowly-tailored application of existing case law requires recusal.

In this death penalty case, Chief Justice Castille of the Pennsylvania Supreme Court served as District Attorney of Philadelphia when Petitioner was originally tried and convicted of murder. As the District Attorney, Chief Justice Castille personally authorized

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[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are on file with the Clerk. A list of *amici* is submitted as an appendix to this brief.

the prosecutors in his office to pursue the death penalty against Petitioner. Later, when he ran for election to the Pennsylvania Supreme Court, he campaigned on the fact that he had personally sent numerous defendants, including Petitioner, to death row.

Petitioner's case ultimately reached the Pennsylvania Supreme Court on the Commonwealth's appeal of a grant of post-conviction relief to the Petitioner. The post-conviction court found that the Philadelphia District Attorney's Office, with Chief Justice Castille in charge, had failed to turn over exculpatory evidence that was relevant to the penalty phase of Petitioner's trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See generally Commonwealth v. Williams*, No. CP-51-CR-0823621-1984 (Phila. Ct. Common Pleas Nov. 27, 2012). Thus, Chief Justice Castille and the other six justices of the Pennsylvania Supreme Court were tasked with deciding whether the prosecutors that had acted on Chief Justice Castille's behalf had violated Petitioner's constitutional rights.

For the reasons discussed in more detail below, Chief Justice Castille's failure to disqualify himself from participation in that appeal violated Petitioner's rights under the Fourteenth and Eighth Amendments. The failure to recuse also undermined the legitimacy of the Pennsylvania Supreme Court, and indeed the judicial system as a whole. Accordingly, *amici* respectfully request that this Court reverse the judgment of the Pennsylvania Supreme Court and remand for new proceedings that are not tainted by the participation of a jurist who was also involved in the prosecution, conviction, and sentencing to death of the Petitioner.

SUMMARY OF ARGUMENT

This Court's due process jurisprudence requires an objective assessment of a judge's relationship to a case to assess whether recusal is constitutionally required. Under existing case law, recusal is required where the judge could potentially be tempted "not to hold the balance nice, clear and true between the state and the accused," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), either because of (1) his relationship to the parties, or (2) an interest in a particular outcome.

Chief Justice Castille's participation in the appeal before the Pennsylvania Supreme Court is problematic for both of these reasons. Because he previously served as the prosecutor who authorized the pursuit of the death penalty against Petitioner, and later campaigned for election to the Supreme Court based in part on successfully obtaining a death sentence against Petitioner, Chief Justice Castille's prior relationship to Petitioner and to the Philadelphia District Attorney's office created an unconstitutional risk that he would not be able to decide the case fairly. Additionally, the nature of the claim before the Pennsylvania Supreme Court – namely, that the Philadelphia District Attorney's Office, under Chief Justice Castille's supervision, withheld exculpatory evidence that could have affected the sentence that Petitioner received – directly implicated the legal and ethical conduct of the Philadelphia District Attorney's Office during Justice Castille's tenure.

These extraordinary circumstances required that Chief Justice Castille disqualify himself from participating in Petitioner's appeal before the Pennsylvania Supreme Court. Additionally, because Chief Justice Castille's participation in that appeal also ultimately increased the risk that a sentence of death

would be imposed on Petitioner, the failure to recuse violated Petitioner's Eighth Amendment rights.

Accordingly, as discussed in more detail below, a narrow application of existing Fourteenth and Eighth Amendment precedent requires that the judgment of the Pennsylvania Supreme Court be reversed, and Petitioner's case be remanded for reconsideration without allowing Chief Justice Castille's participation to infect the perceived impartiality of the court's decision.

ARGUMENT

I. CHIEF JUSTICE CASTILLE'S FAILURE TO RECUSE HIMSELF UNDER THE CIRCUMSTANCES OF THIS CASE VIOLATED PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

A. The Fourteenth Amendment demands recusal where there is an unconstitutionally high risk that the judge might be unable to fairly decide a case.

Judicial recusal has always played an important role in the perceived impartiality of the courts. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (explaining that judicial codes of conduct that set forth requirements for recusal "serve to maintain the integrity of the judiciary and the rule of law"); *White*, 536 U.S. at 817-18 (Ginsburg, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (recognizing the important role that recusal plays in eliminating judicial bias in individual cases); *see also Gormley v. Lan*, 438 A.2d 519, 526 (N.J. 1981) ("The appearance of impartiality is as important to judicial effectiveness and legitimacy as impartiality

itself . . . ."). By and large, recusal is policed by "common law, statute, or the professional standards of the bench and bar." *Caperton*, 556 U.S. at 892 (Roberts, C.J., dissenting) (internal quotation marks omitted). However, there are certain "extraordinary situation[s] where the Constitution requires recusal." *Id.* at 887. This is one of those situations.

Chief Justice Castille's prior relationship to Petitioner's case, and the interest that he had in its outcome, created an impermissible risk that he would be unable to decide the case fairly. Even if Chief Justice Castille was not actually biased in this case, the risk of bias alone seriously undermined "the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such" that Chief Justice Roberts recognized was so important in his dissent in *Caperton*. *Id.* at 890 (Roberts, C.J., dissenting). As discussed below, existing precedent required Chief Justice Castille to disqualify himself, and the decision of the Pennsylvania Supreme Court should be reversed.

The Due Process Clause of the Fourteenth Amendment requires judges to recuse themselves where there exists a constitutionally impermissible risk of bias. This Court first examined the circumstances that require recusal in *Tumey*. In that case, the mayor of a village arrested the defendant and charged him with possession of alcohol. 273 U.S. at 515. The mayor also served as the judge in the case, trying and convicting the defendant of the offense, and ordering him to pay a fine. *Id.* Under a village ordinance, the mayor received a percentage of any fine that was collected, and the remainder of the fine funded a portion of the village's operating budget. *Id.* at 518.

The Court held that due process required the judge to recuse himself, even if the judge's financial interest in the litigation did not in fact influence his decision. *See id.* at 532 ("There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."). In other words, *Tumey* established an objective test to assess whether due process requires a judge to disqualify himself. As the *Tumey* court put it, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to not hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Id.* The "direct, personal, substantial pecuniary interest" of the judge in *Tumey* was one such example of the sort of "possible temptation" that prohibited the judge from deciding the case in a manner that was consistent with due process. *Id.* at 523. Accordingly, the remedy that due process required was that the judge disqualify himself from hearing the case.

Tumey's objective test has been consistently applied in this Court's jurisprudence. Over the years, the Court has found other "possible temptation[s]," *id.* at 532, that require a judge to recuse himself to comport with due process. There are essentially two areas in which the judge's interest in a particular case is so substantial that recusal is required: (1) where a judge would be unlikely to be able to decide a case fairly based on his relationship to one of the parties; or (2) where the threat of impartiality exists because the

judge has a direct interest in a particular outcome of the case.

This Court first examined a relationship between a judge and a litigant that required recusal in *In re Murchison*, 349 U.S. 133 (1955). In *Murchison*, a state court judge indicted two defendants as a "one-man grand jury" pursuant to state procedures, and proceeded to try and convict them. *Id.* at 134-35. The Court noted that after being a part of the accusatory process, a judge "cannot be . . . wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137. Thus, due process is violated where a single judge both "act[s] as a grand jury and then tr[ies] the very persons accused as a result of his investigations." *Id.*

The next case that considered judicial bias against a litigant was *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). In that case, a judge found two *pro se* criminal defendants guilty of criminal contempt based on their conduct at their earlier criminal trial, which that same judge had presided over. *See id.* at 455. The conduct that formed the basis of the contempt charges was egregious. Collectively, the co-defendants insulted the judge's intelligence and impartiality, used profanity in the courtroom, and repeatedly failed to follow instructions. *See generally id.* at 456-62. Under these circumstances, this Court held that due process prevented the judge from presiding over the criminal contempt proceedings. The Court found that the judge had been "embroiled in a running, bitter controversy" with the defendants during the trial, such that the risk of bias was impermissibly high because the judge had suffered "the sting of [the] slanderous remarks" that the defendants had made. *Id.* at 465-66. In short, due process required recusal because the prior history

between the judge and the defendants could diminish the judge's ability to decide the case fairly.[2]

Recusal is also required where the judge has a direct interest in a particular outcome of a case that could threaten his impartiality. Following *Tumey*, the next case to find that such an interest was present was *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). *Ward* is similar to *Tumey* in that it examined the ability of a mayor to adjudicate certain cases and assess fines on individuals that he found guilty. Unlike in *Tumey*, however, the mayor in *Ward* did not *personally* benefit financially from the fines that he assessed. Nevertheless, the Court held that due process prohibited the mayor from hearing those cases because "the revenue produced . . . provide[d] a substantial portion of [the] municipality's funds," and "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60. In other words, recusal was required because acting as both the mayor and the judge were "two practically and seriously inconsistent positions" that could potentially compromise the mayor's ability to decide the cases against the accused impartially, even though no personal financial interest was at stake.[3] *Id.*

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[2] This Court has also addressed recusal in the context of criminal contempt charges in *Johnson v. Mississippi*, 403 U.S. 212 (1971). There, the Court held that a judge was constitutionally required to disqualify himself from presiding over contempt proceedings where he had made "intemperate remarks . . concerning civil rights litigants" and was recently a losing party in a civil rights lawsuit involving the person accused of contempt. *Id.* at 215-16.

[3] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) also addressed recusal because of a judge's interest in the outcome of

The most recent case to examine a circumstance in which due process requires recusal is *Caperton*. In that case, a West Virginia jury found A.T. Massey – a coal company – liable for fraudulent misrepresentation, concealment, and tortious interference with contractual relations, and ordered A.T. Massey to pay $50,000,000 in damages. *Caperton*, 556 U.S. at 872. Shortly after the jury's verdict, West Virginia held an election to select the justices of its state supreme court. *Id.* at 873. Don Blankenship, an officer of A.T. Massey, spent millions of dollars to support the election of Brent Benjamin to the West Virginia Supreme Court, and Benjamin won the election. *Id.*

When the appeal of the jury's verdict reached the West Virginia Supreme Court, Justice Benjamin was asked, and refused, to recuse himself in both the state high court's original consideration of the case and on rehearing. In both instances, Justice Benjamin voted with the majority to reverse the jury's verdict. *Id.* at 874. This Court granted certiorari to consider whether due process required Justice Benjamin to recuse himself from the case. *Id.* at 872.

The Court began its analysis by confirming that *Tumey*'s objective test remains the appropriate inquiry, stating that "[t]he inquiry is an objective one. The

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a case. There, this Court held that a justice of the Alabama Supreme Court could not participate in a case that decided the validity of bad-faith-refusal-to-pay claims against insurance companies because he was a plaintiff in two lawsuits against insurance companies that asserted those types of claims. *Id.* at 817. Thus, the Alabama Supreme Court's decision, which found bad-faith-refusal-to-pay claims to be valid, "undoubtedly 'raised the stakes'" in the justice's participation in his own lawsuits. *Id.* at 824.

Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881. This unconstitutionally high risk of bias exists where "'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Put another way, the task is to engage in a "'realistic appraisal of psychological tendencies and human weakness,'" *Caperton*, 556 U.S. at 883 (quoting *Withrow*, 421 U.S. at 47), in order to assess whether "the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow*, 421 U.S. at 47).

Applied to the facts of *Caperton*, this Court held that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 556 U.S. at 884. The Court reasoned that "[i]t was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.* at 886. And those campaign contributions "had a significant and disproportionate influence on the electoral outcome." *Id.* at 885. Because of these two facts, there is a risk that Justice Benjamin "would . . . feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected," such that there could have been a "possible temptation to the

average judge to lead him not to hold the balance nice, clear and true." *Id.* at 882, 886 (alterations and internal quotation marks omitted). Hence, the risk of actual bias was too great to allow Justice Benjamin to hear the appeal, and his recusal was required by due process.

Tying the two strands of this Court's due process recusal jurisprudence together, recusal is required by the Fourteenth Amendment where the judge's prior relationship to the case or one of the parties, or his interest in the outcome, create an impermissible temptation "not to hold the balance nice, clear and true." *See Tumey*, 273 U.S. at 532. As discussed in more detail below, both of these factors required Chief Justice Castille to recuse himself in Petitioner's case.

B. Chief Justice Castille's former position in the prosecutor's office required him to recuse in a subsequent post-conviction proceeding about whether that office withheld exculpatory evidence.

Three circumstances of Petitioner's case are relevant to the due process inquiry and raise concerns that a reasonable jurist in Chief Justice Castille's position would be tempted to "not hold the balance nice, clear and true" in deciding the Commonwealth's appeal before the Pennsylvania Supreme Court. *See id.* First, Chief Justice Castille was the former Philadelphia District Attorney and, in that role, personally authorized the pursuit of the death penalty against Petitioner. Second, when Chief Justice Castille campaigned for a seat on the Pennsylvania Supreme Court, he publicly emphasized that he sent numerous defendants, including Petitioner, to death row. Third,

the nature of the case before the Pennsylvania Supreme Court created a risk that a reasonable jurist in Chief Justice Castille's position would be biased. The Commonwealth was appealing a lower court's determination that Petitioner was entitled to a resentencing because the Philadelphia District Attorney's Office, under Chief Justice Castille's leadership, had failed to turn over exculpatory evidence, leading to an unconstitutional death sentence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Chief Justice Castille's relationship to this case implicates both strands of this Court's due process jurisprudence. As discussed in more detail below, his role in the case as the district attorney and his public emphasis on his successful death penalty prosecutions created a risk of bias based on his prior relationship to the case that is comparable to the risk found to be constitutionally intolerable in *Murchison*. Chief Justice Castille also had an impermissible interest in the outcome of Petitioner's case, in that he had a "direct, personal, [and] substantial" interest in concluding that the Philadelphia District Attorney's Office did not commit *Brady* violations on his watch. *See Lavoie*, 471 U.S. at 824 (quoting *Ward*, 409 U.S. at 60). This interest in the outcome is similar to those that were found to violate due process in *Ward* and, most recently, *Caperton*.

1. *Chief Justice Castille's prior relationship to Petitioner as the Philadelphia District Attorney created a constitutionally intolerable risk of bias akin to the one found in* Murchison.

As stated above, Chief Justice Castille was the District Attorney of Philadelphia at the time of

Petitioner's original conviction and sentencing. In that role, the Chief Justice was the City of Philadelphia's chief prosecutor and bore the ultimate responsibility for decisions made by the attorneys in his office. He also served as the public personification of the entire organization. Significantly, the National Prosecution Standards of the National District Attorneys Association describe the chief prosecutor as "the elected official ultimately responsible to the community for the performance of the prosecution function." Nat'l Dist. Att'ys Ass'n, Nat'l Prosecution Stds., 3d Ed., at 14, *available at* http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf; *see also* David A. Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How this Affects Police Reform Efforts*, *in The Prosecutor in Transnational Perspective* 59-60 (Erik Luna & Marianne Wade, eds., 2012) ("The elected prosecutor sets office policy, hires and fires staff, serves as the public face of the office, and sometimes makes important decisions in individual cases . . . . The elected nature of the position means that the state prosecutor is ultimately accountable only to the voters of the jurisdiction."); Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 Berkeley J. Crim. L. 395, 419 (2009) (investigating the dynamics of prosecutors' offices and concluding that "[l]eaders possess an unrivaled capacity to define operational culture"). Hence, the chief prosecutor assumes responsibility for the activities of the entire District Attorney's office, both institutionally and in the eyes of the public.

Given this reality, the actions of the prosecutors who report to the District Attorney are imputed to the chief prosecutor in a disqualification analysis. *Cf. United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994) ("Responsibility for prosecution and the precedent investigation is that of the United States Attorney in his district; other attorneys are only his assistants."); *United States v. Ostrer*, 597 F.2d 337, 339 n.4 (2d Cir. 1979) ("Even if [the former prosecutor] did not review these papers himself, knowledge of their contents is imputable to him because of his supervisory status."). This is particularly true in light of the public legitimacy concerns that underlie this Court's due process recusal jurisprudence. *See Caperton*, 556 U.S. at 889 (noting that judicial codes of conduct that prohibit the appearance of bias "serve to maintain the integrity of the judiciary and the rule of law"); *see also Mistretta*, 488 U.S. at 407 ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Accordingly, because the District Attorney is ultimately responsible for all of his office's prosecutions, both institutionally and in the eyes of the community, the actions of *all* of the Philadelphia Assistant District Attorneys, including those that directly prosecuted the Petitioner, must imputed to Chief Justice Castille in due process analysis.

Moreover, even if the actions of all of the prosecutors in the district attorney's office were not imputed to Chief Justice Castille, his own personal involvement in Petitioner's case warranted recusal. As the Philadelphia District Attorney, Chief Justice Castille personally authorized the pursuit of the death penalty against Petitioner. This decision necessarily required that Chief Justice Castille evaluate the circumstances of the case against Petitioner and assess whether

there was a good faith basis for arguing that the death penalty was justified. *See* Pa. R. Prof. Conduct 3.8(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."). In other words, in deciding whether to seek the death penalty against Petitioner as a prosecutor, Chief Justice Castille necessarily formed an opinion about whether the death penalty was appropriate in Petitioner's case, and therefore could not approach the Commonwealth's appeal from the neutral perspective that due process requires. Given this prior involvement, Chief Justice Castille's participation in Petitioner's case seriously impugns the public perception of the judiciary and threatens the integrity and legitimacy of the judicial process. *See Mistretta*, 488 U.S. at 407.

More fundamentally, Chief Justice Castille's likely preconceived notions about the appropriate outcome in Petitioner's case are the antithesis of the impartial review that the Fourteenth Amendment demands, and are akin to the interest of the judge in *Murchison* who this Court held was constitutionally required to recuse. In that case, this Court found that a judge who had accused a witness of criminal contempt could not try the witness on that same charge because, "[h]aving been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *In re Murchison*, 349 U.S. at 137. Just as in *Murchison*, where it would be "difficult if not impossible" for the judge to "free himself from the influence of what took place" during the previous grand jury proceedings, *id.* at 138, it would be similarly difficult or impossible for Chief Justice Castille to escape the influence of the view of Petitioner's case that he developed when it was prosecuted under his direction. Indeed,

Murchison intimates that a former prosecutor would have an *even more difficult* time distancing himself from the role that he played, and the opinion of the case that he formed, while in that office. *See id.* ("While [the judge] would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.").

There is a wealth of evidence to suggest that reasonable jurists in the Chief Justice's position are likely to be biased in this sort of situation. Numerous advisory opinions of the relevant ethical authorities in several states indicate that recusal is ethically required under the circumstances of this case. *See, e.g.*, N.Y. Ethics Opinion 89-117 (Oct. 24, 1989), *available at* http://www.courts.state.ny.us/ip/judicial ethics/opinions/89-117.htm ("A judge who previously was employed as a county attorney may not preside over matters in which the judge formerly was the attorney of record, whether or not the judge personally had participated in the case."); State Bar of Michigan, Advisory Opinion JI-34 (Dec. 21, 1990) ("[A] judge who was the chief prosecutor in the county is disqualified from hearing any portion of a criminal or civil case involving the state or county which was initiated or pending while the judge served as a prosecutor."); Indiana Comm'n on Judicial Qualifications, Advisory Opinion # 3-89 ("A former Prosecuting Attorney is disqualified from any criminal proceeding initiated, investigated, filed, or pursued by the office of the Prosecuting Attorney during the judge's term as prosecutor. Even if the prosecutor did not actively prosecute the cause or has no recollection of it at all, disqualification is necessary . . . . [T]he ideals of judicial independence and the appearance thereof are accomplished only upon the disqualification of a former Prosecuting Attorney in a case filed during his

term."); Judicial Ethics Advisory Committee of the State of Delaware, JEAC 2007-3 (June 29, 2007) ("Presiding over a criminal case that was filed during your tenure as Attorney General – or a criminal case that, having been earlier filed, was prosecuted during your time in office – creates the appearance of impropriety and gives rise to reasonable questions concerning your impartiality. This advice applies equally to such cases despite that you were neither personally nor substantially involved in the prosecution of those cases.").

Of course, these opinions are not determinative of the constitutional question, as "States may choose to adopt recusal standards more rigorous than due process requires." *Caperton*, 556 U.S. at 889. Nevertheless, the consensus of opinions on this subject suggests that this is exactly the sort of circumstance where, viewed objectively, the risk of judicial bias is elevated. At a minimum, those advisory opinions reflect the perception of a bias that inevitably results from the refusal to recuse.

The second circumstance of this case that contributes to the inescapable conclusion that Chief Justice Castille was required to recuse himself is the fact that, during his campaign for election to the Pennsylvania Supreme Court, he expressed strong support for the death penalty by publicly emphasizing that he sent numerous defendants – including Petitioner – to death row. *See, e.g.*, Lynn A. Marks & Ellen Mattleman Kaplan, "Disorder in the Courts," *Pittsburgh Post-Gazette*, Nov. 14, 1993, *available at* 1993 WLNR 2150772; Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," *Legal Intelligencer*, Oct. 28, 1993, *available at* https://advance.lexis.com/api/permalink/a7f1fe95-55f4-4534-9b46-542d8af93e99/

context=1000516; Katharine Seelye, "Castille Keeps His Cool in Court Run," *Phila. Inquirer*, Apr. 30, 1993, at 1993 WLNR 1997262. Undoubtedly, statements made in favor of the death penalty during a judicial campaign are protected by the First Amendment and should not mandate that a judge recuse himself in all subsequent death penalty prosecutions. *See White*, 536 U.S. at 788 (2002). However, the comments that Chief Justice Castille made during his election campaign are relevant to the due process inquiry under the unique circumstances of this case because they demonstrate that, as reflected in his own public statements, the Chief Justice considered himself to be personally responsible for the death penalty convictions that the Philadelphia District Attorney's Office obtained during his tenure. Indeed, it is difficult to believe that Chief Justice Castille would boast of his sending forty-five individuals to death row unless he was convinced that each and every one of them deserved the death penalty and that it was an appropriate sentence under the law.[4] Chief Justice Castille's comments further indicate that he

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[4] Chief Justice Castille's comments about his involvement in the decision to authorize the death penalty in cases that he supervised as the Philadelphia District Attorney have been contradictory, thereby further undermining public confidence in the judiciary. During his electoral campaign, Chief Justice Castille emphasized that he was responsible for sending defendants to death row. By contrast, when asked to recuse himself on those grounds, Chief Justice Castille distanced himself from that decision, saying that his role in the authorization of the death penalty in the Philadelphia District Attorney's Office was merely an "administrative formality" that "simply represented a concurrence in their judgment that the death penalty statute applied, i.e., that one or more of the statutory aggravating circumstances existed, and nothing more." *See Commonwealth v. Rainey*, 912 A.2d 755, 757-58 (Pa. 2006) (Castille, J.).

had already formed an opinion about Petitioner's case and therefore it would be exceedingly difficult for a reasonable judge in Chief Justice Castille's position to approach the case with the degree of impartiality that is required by the Constitution. In other words, this is one of the "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 556 U.S. at 877 (quoting *Withrow*, 421 U.S. at 47).

2. *Given the nature of Petitioner's claim, Chief Justice Castille's interest in the outcome of the case demanded disqualification.*

As mentioned above, Petitioner's case was before the Pennsylvania Supreme Court because the Commonwealth had appealed a post-conviction court's grant of a resentencing based on the failure of the Philadelphia District Attorney's Office to turn over certain exculpatory evidence, in violation of *Brady*. Specifically, the post-conviction court found that the Philadelphia District Attorney's Office had both failed to disclose exculpatory evidence and "affirmative[ly] misrepresent[ed] . . . that such evidence did not exist." *Williams*, slip op. at 25. That court also found that "the government interfered with the presentation of evidence" during the original trial, *id.* at 18, and that "[t]hough the government suppressed only a few choice statements, the impact of suppression was far-reaching," and "would have changed at least one juror's view" of the victim. *Id.* at 50. In short, Petitioner had established that the Philadelphia District Attorney's Office had violated his right to due process at the penalty phase of his original trial. At

that time, the Philadelphia District Attorney's Office operated under Chief Justice Castille's direction.

Given the nature of the post-conviction court's findings, Chief Justice Castille's participation in the appeal of this decision violated due process. On appeal, the Chief Justice was asked to determine whether the Philadelphia District Attorney's Office had infringed a criminal defendant's constitutional rights in a death penalty case investigated and prosecuted on his watch. *See Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").[5] Even though Chief Justice Castille was no longer affiliated with the District Attorney's office when Petitioner's case reached the Pennsylvania Supreme Court, it would be exceedingly difficult for a reasonable judge in his position not to view the findings of the post-conviction court as an affront to his leadership and supervision of the District Attorney's Office, and as a poor reflection of his tenure as District Attorney. In short, Chief Justice Castille would have had a "'direct, personal, substantial'" interest in the outcome of Petitioner's

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[5] Notably, the post-conviction court's findings here suggest that the Philadelphia District Attorney's Office did not act in good faith. *See Williams*, slip op. at 25 (discussing the Philadelphia District Attorney's Office's *affirmative misrepresentation* that the exculpatory evidence that Petitioner requested did not exist). This finding further suggests that Chief Justice Castille would not be able to impartially evaluate Petitioner's claim, as the perceived negative reflection on Chief Justice Castille's tenure as the Philadelphia District Attorney would be exponentially greater than a situation where the District Attorney's Office had simply made a mistake.

appeal. *See Caperton*, 556 U.S. at 876 (quoting *Tumey*, 273 U.S. at 523).

Indeed, the "official motive" that Chief Justice Castille likely would have had to conclude that the Philadelphia District Attorney's Office acted appropriately is analogous to the previous situations in which this Court has held that a judge must recuse himself because of an impermissible interest in the outcome of the case. *Id.* at 878. Just as the mayor/judge in *Ward* had an incentive to manage the village finances as best he could, 490 U.S. at 60, Chief Justice Castille had a similar incentive to rule in favor of the Philadelphia District Attorney's Office in this case. A finding that the District Attorney's Office withheld exculpatory evidence in violation of Petitioner's constitutional rights would necessarily require Chief Justice Castille to conclude that the Philadelphia District Attorney's Office made a serious error during his tenure, thereby negatively impacting the public assessment of his performance as District Attorney, just as a finding of innocence by the mayor/judge in *Ward* would reflect negatively upon the mayor/judge's performance of his executive duties. In both circumstances, making such an assessment is "practically and seriously inconsistent" with the role of a judge. *Id.* In Chief Justice Castille's case, it also violates the maxim set forth by this Court in *Murchison* that "no man can be judge in his own case," as Chief Justice Castille was being asked to indirectly evaluate his own performance as District Attorney. *See* 349 U.S. at 136.

Caperton further demonstrates that due process mandated Chief Justice Castille's disqualification. The nature of Petitioner's claim is likely to especially implicate Chief Justice Castille's feelings of loyalty toward the Philadelphia District Attorney's Office in

the way that an ordinary case would not. These feelings of loyalty are analogous to the "debt of gratitude" the justice in *Caperton* may have felt toward one of the litigants, and the risk that sentiment could have influenced the Chief Justice's decision in this case is constitutionally intolerable. *See Caperton*, 556 U.S. at 882.

This is not to suggest that recusal would be constitutionally required in every single case involving the Philadelphia District Attorney's Office that makes its way to the Pennsylvania Supreme Court. But this is not an ordinary case. Here, the Pennsylvania Supreme Court was asked to assess whether the Philadelphia District Attorney's Office violated Petitioner's constitutional rights by failing to turn over exculpatory evidence *under Chief Justice Castille's watch*. Under these extraordinary circumstances, Chief Justice Castille would likely feel an allegiance to the prosecutors that he supervised whose actions were in question. This allegiance is compounded by the fact that, unlike in *Caperton*, deciding this case in Petitioner's favor would have reflected poorly on Chief Justice Castille himself, as the District Attorney who was ultimately responsible for the actions of that office. Thus, not only was Chief Justice Castille's recusal required by *Caperton*, but his participation in Petitioner's appeal was an even more significant violation of due process than the failure to recuse in *Caperton*.

Chief Justice Castille's participation in the Commonwealth's appeal is also analogous to that of the judge in *Mayberry v. Pennsylvania*, who this Court held was constitutionally barred from trying a defendant for contempt where he had become "embroiled in a running, bitter controversy" with the person accused

of contempt. 400 U.S. at 465. Just as "[n]o one so cruelly slandered [as the judge in *Mayberry*] is likely to maintain that calm detachment necessary for fair adjudication," *id.*, a former District Attorney who is being asked to weigh in on a claim that directly implicates the integrity of the office he managed likely will be unable to impartially evaluate such a claim, the very nature of which questions Chief Justice Castille's aptitude as a former District Attorney. Importantly, a decision in favor of the Petitioner would unequivocally cast Chief Justice Castille's prior work as a District Attorney in an unfavorable light.

For this reason, there is a substantial risk that Chief Justice Castille's natural inclination would be to attempt to justify the prior actions of those he supervised, just as anyone who is acting in his own rational self-interest would likely do. That risk necessitates recusal, and the failure to do so violates due process.

The damage to the perceived impartiality of the judiciary, and therefore the legitimacy of the Pennsylvania Supreme Court's decision, caused by Chief Justice Castille's participation in Petitioner's appeal is illustrated by certain statements he made in a concurring opinion in this case. *Cf. White*, 536 U.S. at 817-18 (Ginsburg, J., dissenting); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). In that opinion, the Chief Justice revealed a long-standing animus against the Federal Community Defender's Office ("FCDO"), which represented Petitioner in his post-conviction proceedings, including before the Pennsylvania Supreme Court. He harshly criticized the FCDO, stating that it had engaged in "multiple attempts to delay and obstruct cases, as well as attempts to

unsettle and undermine Pennsylvania law." *Commonwealth v. Williams*, 105 A.3d 1234, 1246 (Pa. 2014) (Castille, C.J., concurring). Chief Justice Castille's concurrence also characterized the FCDO as having turned Pennsylvania post-conviction proceedings "into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow," *id.* at 1247, and described the FCDO's litigation strategy as one of "multiple attempts to delay and obstruct cases, as well as attempts to unsettle and undermine Pennsylvania law." *Id.* at 1246. Even more shockingly, at one point in that concurring opinion, the Chief Justice even intimates that Petitioner's application for post-conviction relief was less credible *by virtue of the fact that it was made by a lawyer who worked for the FCDO*. *See id.* at 1250 (Castille, C.J., concurring) ("[Petitioner's case] was not an ordinary case, but not for the reason cited by the court: it was a last-ditch fourth state collateral petition, *filed by the FCDO no less*, after federal review had concluded, rehashing old claims that just happened to involve a two-time murderer finally facing the execution of his sentence." (emphasis added)).

Indeed, upon reading Chief Justice Castille's concurring opinion in this case, one is left with the distinct impression that Petitioner's case was doomed from the start, simply because of the organization that represented him. Even if that is not actually true, this sort of impression seriously undermines the legitimacy of the Pennsylvania Supreme Court's opinion, particularly because of Chief Justice Castille's previous position as the Philadelphia District Attorney. Whether accurate or not, the perception is that the Chief Justice is either unable or unwilling to separate

himself from the mindset of a prosecutor in assessing the veracity of the Petitioner's claims.[6]

3. Chief Justice Castille's recusal was required even if he was not actually biased in the consideration of Petitioner's case.

The influences on Chief Justice Castille discussed above do not, of course, compel the conclusion that he was actually biased in concluding that the post-conviction court's grant of post-conviction relief should be reversed. It is entirely possible that Chief Justice Castille carefully evaluated the above combination of influences and concluded, after a "probing search into his actual motives and inclinations," that he could decide this case impartially. *See Caperton*, 556 U.S. at 882. That, however, is not the inquiry that the Constitution demands.

This Court has consistently reaffirmed that the due process inquiry into judicial bias is an objective one. *See, e.g., id.* at 881 ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"); *Tumey*, 273 U.S. at 532 ("There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial

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[6] Notably, not all judges share Chief Justice Castille's low opinion of the FCDO. On the contrary, at least one federal judge has described the services that the FCDO provides in death penalty cases as that of "highly qualified defense counsel." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 481 (3d Cir. 2015) (McKee, C.J., concurring).

procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."). There is good reason for this rule. It is exceedingly difficult to inquire into and identify actual bias, even with the most searching of inquiries. *Caperton*, 556 U.S. at 883. An objective standard is also important because it allows for more effective review of recusal decisions. As this Court recognized in *Caperton*, "[t]he judge's own inquiry into actual bias . . . is not one that the law can easily superintend or review." *Id.*

In deciding not to recuse himself in Petitioner's case before the Pennsylvania Supreme Court, Chief Justice Castille undoubtedly concluded that, in his own subjective view, he could ignore the influences discussed above and decide Petitioner's case fairly. *Amici* do not question the correctness of Chief Justice Castille's personal assessment of his bias. However, even assuming that Chief Justice Castille could in fact decide Petitioner's case impartially, due process requires more. Given the Chief Justice's relationship to Petitioner's case, the *risk* that he would allow "psychological tendencies and human weakness" to creep into his decision in the case was simply too great to comport with due process, and Chief Justice Castille was required to recuse himself. *See id.* at 883-84 (internal quotation marks omitted).

II. BECAUSE THIS IS A DEATH PENALTY CASE, CHIEF JUSTICE CASTILLE'S FAILURE TO RECUSE HIMSELF ALSO VIOLATED THE EIGHTH AMENDMENT.

This Court has previously recognized that the Eighth Amendment creates a "heightened need for reliability in the determination that death is the

appropriate punishment in a specific case." *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (internal quotation marks omitted). Where that reliability is compromised by procedural irregularities that "affect the fundamental fairness" of the imposition of a sentence of death, the Eighth Amendment is violated. *See id.* This is because, as Justice Stevens has explained,

> death is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion."

Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.) (emphasis added); *see also Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.") (internal quotation marks omitted). Because of the finality of a death sentence, any law that "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" violates both the Fourteenth and Eighth Amendments. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Chief Justice Castille's participation in the appeal of the grant of Petitioner's post-conviction relief impermissibly heightened the risk that Petitioner would ultimately face the death penalty, despite the existence of exculpatory evidence that could potentially warrant a lesser sentence. As discussed in detail above, the post-conviction court found that this exculpatory evidence had a "far-reaching" impact on the outcome of the penalty phase of Petitioner's trial and "would have changed at least one juror's view" of the victim, thereby potentially affecting the decision to impose the death penalty on Petitioner. *See Williams*, slip op. at 25.

The due process analysis above demonstrates that Chief Justice Castille's participation in Petitioner's case created an unacceptably high risk of bias. Because the Pennsylvania Supreme Court was ultimately tasked with deciding whether Petitioner was entitled to be resentenced, the risk that Chief Justice Castille could not impartially assess this critical issue compromised the reliability of the "determination that death is the appropriate punishment" in Petitioner's case. *See Caldwell*, 472 U.S. at 340. Hence, under this Court's precedents, Chief Justice Castille's failure to recuse himself violated the Eighth Amendment. *See Lockett*, 438 U.S. at 605.

CONCLUSION

For the foregoing reasons, Chief Justice Castille's participation in the Commonwealth's appeal of the grant of Petitioner's post-conviction relief violated the Fourteenth and Eighth Amendments. Accordingly, the *amici* respectfully urge this Court to reverse the judgment of the Pennsylvania Supreme Court, and to remand to allow that court to conduct new proceedings

that are not tainted by Chief Justice Castille's participation.

Respectfully submitted,

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December 7, 2015

APPENDIX

APPENDIX

LIST OF *AMICI CURIAE*

Leland Anderson served as a Deputy District Attorney in Denver from 1976 to 1979, and then as a District Court Judge for Colorado's First Judicial District from 1997 to 2007 In 2001, he was president of the Colorado District Judge's Association.

Arthur Burnett was an attorney in the United States Department of Justice's Criminal Division in 1958 and again from 1960 to 1965, and was an Assistant United States Attorney for the District of Columbia from 1965 to 1969. He then served as a United States Magistrate Judge for the District of Columbia from 1969 to 1975 and from 1980 to 1987. From 1987 until 2013, he served as a judge on the District of Columbia Superior Court.

Virginia Chavez served as a Deputy District Attorney for Boulder County, Colorado from 1979 to 1983 and as a Boulder County Judge from 1987 to 1993.

Robert Cindrich was United States Attorney for the Western District of Pennsylvania from 1978 to 1981, and served as District Judge for the United States District Court for the Western District of Pennsylvania from 1994 to 2004.

Jean Dubofsky was a Deputy Attorney General for the State of Colorado from 1975 to 1977, and served as a Justice on the Colorado Supreme Court from 1979 until 1987.

Bruce Einhorn served as Special Prosecutor and Chief of Litigation in the Office of Special Investigations at the United States Department of Justice from 1979 to 1990, and was a Judge for the

federal Los Angeles Immigration Court from 1990 to 2007.

Hal Hardin served as an Assistant District Attorney in Davidson County, Tennessee from 1968 to 1970, as a Circuit Court judge in Davidson County from 1975 to 1977, and as a Special Judge for the Tennessee Court of Appeals in 1977. He was the United States Attorney for the Middle District of Tennessee from 1977 until 1981.

Nathaniel R. Jones served as an Assistant United States Attorney for the Northern District of Ohio. He was later appointed as a judge on the United States Court of Appeals for the Sixth Circuit in 1979 and served until his retirement in 2002.

Gerald Kogan served in the Dade County, Florida State Attorney's office from 1960 to 1967, serving as an Assistant State Attorney and Chief Prosecutor in the Capital Crimes Division. He was appointed to the Florida Eleventh Judicial Circuit in 1980, and then to the Florida Supreme Court in 1987, serving as Chief Justice from 1996 until his retirement in 1998.

A. Melvin McDonald was a prosecutor in Arizona's Maricopa County Attorney's office from 1970 to 1974, before serving as Superior Court Judge for Maricopa County from 1974 to 1981 and then as United States Attorney for the District of Arizona from 1981 to 1985.

William Sessions was the United States Attorney for the Western District of Texas from 1971 to 1973. He then served as United States District Judge for the Western District of Texas from 1974 to 1987, including seven years as Chief Judge. In 1987, he was nominated to be Director of the Federal Bureau of Investigation, serving until 1993.

Herbert Stern served as United States Attorney for the District of New Jersey from 1971 to 1974, and then as United States District Judge for the District of New Jersey from 1974 to 1987.

Larry Turner prosecuted felony cases as an Assistant State's Attorney for the Eighth Judicial Circuit in Florida from 1970 until 1971, and then served as a Circuit Court judge for the Eighth Judicial Circuit from 1997 to 2004.

Russel Walker was appointed as District Attorney for North Carolina's Randolph and Montgomery counties, serving from 1979 until 1980. He then served as Special Superior Court Judge in North Carolina from 1982 to 1984, when he was elected Senior Resident Superior Court Judge, holding the position until his retirement in 2004.

Daniel Weinstein was Chief Assistant District Attorney of San Francisco from 1976 to 1978. He then served on the Municipal Court of San Francisco from 1978 to 1982 and on the Superior Court of San Francisco from 1982 to 1988, including a year as an Associate Justice Pro Tempore on the California Supreme Court.

Alfred Wolin served as a special assistant prosecutor for Union County, New Jersey in 1970 and as a municipal prosecutor for the Town of Westfield, New Jersey from 1973 to 1974. He was a judge on the Union County District Court and New Jersey Superior Court before being appointed to the United States District Court for the District of New Jersey in 1987, where he served until 2004.